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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No.

ROBERT SPIKINGS,

Petitioner,

vs.

WABASH RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner deems this case of sufficient national moment to elicit *certiorari* because the Court of Appeals for the Seventh Circuit, annulling petitioner's verdict in the sum of $42,500 for injuries sustained in a collision between petitioner's automobile and defendant's railroad train and remanding for judgment notwithstanding that verdict, has explicitly recognized and quoted in its opinion the testimony of five witnesses that the headlight on respondent's train was not burning, has held that this direct evidence was overborne by contradictory testimony offered by the respondent, and has avowedly predicated its opinion upon

its appraisal of the veracity of witnesses, the credibility of testimony and the tenability of inferences drawn from conflicting versions of the accident.

In thus directing judgment notwithstanding the verdict upon its view of the weight of the evidence, the Court of Appeals followed its recent precedents in which it has similarly preempted from the jury the question of the plaintiff's due care, the defendant's negligence or proximate cause in night-time railroad and automobile collision cases in which it was claimed that the defendant's train was unlighted. *Cf. Reynolds* v. *Baltimore & O. R. Co.* (1950), 185 F. 2d 27, and *O'Keefe* v. *Wabash R. Co.* (1950), 185 F. 2d 241, discussed in the Argument, Point II, *post,* which, with this case, are, we believe, the only night time railroad cases decided by that court in the past three years.

Petitioner most respectfully but very earnestly contends that the Court of Appeals so seriously misconceives the function of a Federal reviewing court in railroad collision cases as gravely to compromise the right of trial by jury that is guaranteed by the Seventh Amendment.

Mindful that this Court will not usually examine the complex of facts buried in the record of ordinary litigation, petitioner relies for his Statement of the Case and grounds of reversal entirely upon the text of the opinion of the Court of Appeals. All quoted statements and transcript references are therefore to that opinion.

Petitioner "suffered serious personal injury and it borders on the miraculous that he was not killed" (Tr. 529) in a collision that "took place at the intersection of 83rd Place and the tracks of the defendant on the outskirts of the City of Chicago" (Tr. 518) at 5:30 p.m., February 6, 1948, "when plaintiff's truck was struck by defendant's passenger train No. 10, known as the Banner Blue" (Tr. 519).

The closely built up and densely populated character of the *locale* of the accident and the heavy railroad and automobile traffic at the intersection are described in the opinion of the Court of Appeals (Tr. 519). Since petitioner does not rely upon any peculiar feature of the *locale* or of the intersection beyond the fact that the intersection was a busy urban crossing, we do not reproduce this description in this Statement.

> "Plaintiff's [petitioner's]argument in support of the judgment rests mainly, if not entirely, upon the premise that the train was traveling in the dark without headlight, as is required by the Illinois statute (Ch. 114, Ill. Rev. Stat., Sec. 187)" (Tr. 520).

The question whether the headlight was or was not burning was the crucial issue of fact in the case.

> "The weather on the date in question was clear and cold, the ground was covered with snow which had previously fallen, sunset was at 5:12 p. m., and the collision took place eighteen minutes later or at 5:30 p. m." (Tr. 521).

The Court of Appeals thus summarized the plaintiff's evidence upon which the jury found that the headlight was not burning:

> "Plaintiff testified that as he approached the crossing, traveling east on 83rd Place, he stopped about ten feet west of the first rail of the switch track and talked to a boy. He then started up and stopped again within four or five feet of the first rail of the switch track. At that time he looked both ways and saw nothing coming. He said he could see about two hundred feet to the right and the same distance to the left. He again started up and, when just about at the first rail of the southbound track, he looked to his right and left but didn't see the train and didn't hear any noise at that time. As he got to the first rail of the third track (northbound) he heard a noise, looked out the right window and saw a black object which caused him to look to his right, the front wheels of his truck were

just over the first rail of the northbound track. Both of his windows were open about two inches to keep the frost off the windshield. He was asked by his own counsel, 'Did you hear any whistle sounded at any time?' and he answered, 'No, sir, I did not,' and also, **'Did you see or observe any light on the black object?' and he answered, 'No, sir.'** ''

The Court of Appeals thus summarized the testimony of plaintiff's witness Elizabeth Raney (Tr. 522):

"Elizabeth Raney, a witness for the plaintiff, testified that at the time of the accident she lived in an apartment building at 3534 West 83rd Place. This building was located two hundred feet east of the Grand Trunk tracks or something more than five hundred feet from the intersection where the accident occurred. She was in her apartment preparing dinner, and looking out the kitchen window had a clear, unobstructed view of 83rd Place west of the point of the accident. She saw a truck traveling east on 83rd Place when it was about half-way between the Southwest Highway and the railroad crossing. Thus, the truck was more than six hundred feet distant when first seen by her. At that time she observed that the truck was yellow. About half a minute later she looked again and saw that the locomotive had passed 83rd Place with a truck on the front of the engine. **When asked by plaintiff's counsel, 'Will you state whether or not the headlight was burning on the engine when you saw it pushing the cab along?' she answered, 'No, sir.'** Relying on this question and the answer, plaintiff in his brief states, 'This witness stated categorically, the headlight was not burning on the locomotive.' It is obvious from the question that she stated no such thing and any doubt is removed by her further testimony that she was viewing the train from its side and could not state whether the engine headlight was burning. Mrs. Raney watched the train travel in the direction of Chicago with part of the truck on the engine, past the intersection of the Wabash and the Grand Trunk tracks." (Emphasis added.)

In declaring that a witness who has observed a locomotive from the side cannot see whether the headlight is or is

not burning, the Court of Appeals inadvertently overlooked the elementary experience of all mankind that the beam of a headlight, though projected forward, is visible from a side view of the beam.

The Court of Appeals thus summarizes the balance of the plaintiff's evidence on the issue that the headlight was not burning (Tr. 522-523):

> "Dorothy Cerney lived in the same apartment building as Mrs. Raney and heard the crash. She immediately ran out into the street, and by that time the train was directly north of her. She was asked by plaintiff's counsel, 'Now, before you heard the crash, Mrs. Cerney, did you hear any railroad train whistle?' and she answered, 'Well, I couldn't say that I did,' **and she was asked, 'As you looked north toward the train, did you observe whether there was a headlight burning on the train?' and she answered, 'I didn't see any.'** Later she testified that she couldn't see that end of the train and, when asked on cross-examination, 'You didn't know whether it whistled or not?' she answered, 'That was what I said. I didn't know whether the train whistled or not.'
>
> "Dorothy Schmidt, an 11-year old girl, lived in the same apartment building. She heard the crash and when she first saw the locomotive it was just at the Ashburn Station, with something on the front which she described as looking like a pile of junk. **She was asked by plaintiff's counsel, 'Did you see any light on the locomotive burning?' and she answered, 'No'.**
>
> "Robert Ceman testified that he arrived at the scene of the accident a little before six o'clock **and that the headlight on the engine was not burning.** This is the only positive evidence in the record that the headlight was not burning, and that was at a time some twenty-five minutes after the collision."

The Court of Appeals then made the following very important statement (Tr. 523):

> "This is the sum and total of all the proof offered by the plaintiff bearing on the assertion that the engine

> was running without a headlight or that no whistle was blown for the crossing. It will be noted that there is no positive evidence even from the plaintiff himself in support of either assertion. The most that can be said is that the witnesses testified either that they saw no headlight or heard no whistle."

In short, the Court of Appeals has held, presumably as a rule of evidence, that testimony of witnesses that they saw no headlight burning is not testimony from which a jury may find that no headlight was burning. The Court of Appeals made this statement although the plaintiff, his witness Dorothy Schmidt and his witness Robert Ceman all looked directly at the locomotive, whereas his witness Elizabeth Raney had a side view of the accident and his witness Dorothy Cerney testified that as "she looked north toward the train," she "didn't see any headlight burning."

The Court of Appeals then summarized **and expressly weighed** countervailing evidence. The opinion adverts to the testimony of defendant's witness Thomas Cooney, a police officer, that he "arrived at the scene of the accident about 6 p. m. and admitted that at that time the headlight of the locomotive was burning," that "two of the **most striking witnesses** offered by the defendant," William Niewold, a boy "ten years of age" and V. O. Elkins, who "had been employed by the Wabash Railroad as a telegrapher for ten years," both said that they saw the headlight burning before the collision. Defendant's fireman on the train testified that "the headlight was on and had been on since the train left Decatur, Illinois, and that a rule of the Wabash required the headlight to be on at all times when the train is running, even in broad daylight" (Tr. 525). The Court of Appeals also mentioned the deposition of the engineer, who "died before the trial" but who had deposed "that the engine headlight was on" (Tr. 525), as well as the testimony of a postal transportation clerk on the train

that he "looked forward and saw the headlight of the train shining" on a "mail bag from the crane at Oak Lawn, two miles south of Ashburn Station" (Tr. 525).

The Court of Appeals then makes this statement (Tr. 525-526):

> "Other witnesses who testified that the whistle was blown as the train approached the point of the collision and that they observed the headlight was on, either prior to the collision or when the train came to a stop, were Elwood Long, a porter on the train, Andrew Williams, a dining car waiter and John Thomas Daley, superintendent of motor power of the Alton and Southern Railroad, who was a passenger on the Wabash train. Also, Adam J. Madura, a Chicago police officer, testified that he arrived at the scene about five minutes before six, and the headlight was on at that time."

Summing up its appraisal of the veracity of the witnesses and the credibility of their testimony, the Court of Appeals said (Tr. 528):

> "In our view, there could be no diversity of opinion among reasonable men but that plaintiff's negligence was the cause of the collision and his resultant damage. There is not a scintilla of positive evidence that the whistle was not blown and there is nothing more than the barest inference that the train was traveling in the dark without a headlight. As we have shown, the direct, positive evidence overwhelmingly demonstrates that such was not the fact. The only witness in a position to see the headlight and failed was the plaintiff, the one charged with the duty of looking for it. And there was no witness, other than plaintiff, who was listening and did not hear the whistle, and he did not testify it was not blown but only that he did not hear it."

The Court of Appeals is in error, as appears from its own opinion, in its statement that "the only witness in position to see the headlight and failed was the plaintiff." As we have shown, wholly by quotations from the court's

FILED
APR 22 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 738

ROBERT SPIKINGS,

Petitioner,

vs.

WABASH RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT OF PETITION.

WILLIAM C. WINES,
JAMES A. DOOLEY,
111 W. Washington St.,
Chicago 2, Illinois,
FRANCIS J. DELANEY,
1317 F Street N.W.,
Washington 4, D. C.
Attorneys for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 565

own opinion, plaintiff's witnesses Cerney, Schmidt, Raney and Ceman were all in a position to see whether the headlight was burning and all declared that it was not lighted.

The Court thus concludes its opinion (Tr. 529):

> "Plaintiff suffered serious personal injury and it borders on the miraculous that he was not killed. It is not a pleasant duty to reverse the modest judgment which he obtained, but after giving the case the most careful study and thought of which we are capable we conclude that the law so requires. It follows that the court erred in its refusal to allow defendant's motion notwithstanding the verdict.
>
> "The cause is reversed and remanded, with directions that such motion be allowed."

Thus the Court of Appeals has reversed with directions for the entry of a judgment notwithstanding the verdict upon its view that "the direct, positive evidence overwhelmingly demonstrates" that the headlight was not burning although the plaintiff and four other witnesses testified that such was not the fact.

BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

This Court has jurisdiction to review the judgment in question under section 1254 of the Judicial Code (Title 28, U. S. C. A. sec. 1254).

Judgment in this case was entered on January 7, 1953. The Transcript of Record was filed and the docket fee was paid and within ninety days from the date of the judgment in this cause. This court, per Mr. Justice Minton, has enlarged the time for filing of this Petition to and including April 21. Hence this Petition is timely.

THE QUESTION HERE PRESENTED.

The question presented is:

1. DID THE COURT OF APPEALS, BY REVERSING THIS CAUSE FOR JUDGMENT NOTWITHSTANDING THE VERDICT UPON ITS VIEW OF "THE OVERWHELMING WEIGHT OF THE EVIDENCE," DEPRIVE PETITIONER OF THE FRUITS AND THEREFORE OF THE RIGHT OF TRIAL BY JURY WITHIN THE PURVIEW OF THE SEVENTH AMENDMENT?

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

The opinion of the Court of Appeals evinces that court's conception that it may award a judgment notwithstanding the verdict upon its view as to the preponderance of directly conflicting testimony as to objective facts.

Under Point II of the Argument, in the Brief in Support of this Petition, *post,* we demonstrate that the Court of Appeals has held in the only three night-time railroad crossing cases decided by it since 1949, *Reynolds* v. *Baltimore & O. R. Co.* (1950), 185 F. 2d 27, and *O'Keefe* v. *Wabash R. Co.* (1950), 185 F. 2d 241, and the instant case, that court has reversed judgments for the plaintiff and peremptorily directed judgments for the defendant. The analysis of those opinions and the opinion in the instant case shows that the Court of Appeals for the Seventh Circuit so gravely misconceives its function in this type of case as seriously to impair the constitutional right of trial by jury.

So that this court need not canvass the record, we are willing that this Court consider this application for *certiorari* solely upon the Court of Appeals' own treatment of the facts and that court's enunciation in this opinion of

what it deems to be the applicable principles of Federal appellate judicature in cases of this kind.

All of the cases cited by the Court of Appeals arising from accidents at crossings involved "daylight collision." This is true, *inter alia, of* the Illinois decisions, which are of course authoritative upon the *substantive* rights of the parties.

But, contrary to the Court of Appeals' evident misunderstanding, the Illinois decisions cited by the Court of Appeals are **not** applicable in the least to the question of the appropriate partition of judicial functions among jury, trial court and reviewing court in the Federal Judicial system.

Therefore when the Court of Appeals cites Illinois cases as authority for reversing a jury's verdict upon questions of fact, even in diversity of citizenship cases arising wholly under Illinois' substantive law, it misprises the import of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, which has to do with substantive rights. This misconception is of sufficient gravity to call for *certiorari.*

PRAYER FOR THE WRIT OF CERTIORARI.

Wherefore, petitioner prays this Court's writ of *certiorari* to review and reverse the decision of the Court of Appeals for the Seventh Circuit in this case.

WILLIAM C. WINES,
JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois.

BRIEF IN SUPPORT OF THE PETITION.

Reference to Petition for Statement of the Facts and of the Questions Presented.

The facts are stated and the question sought to be pre sented is delineated in the Petition for *Certiorari.* There fore reference to that petition for Statement of the Fact and of the question presented is respectfully made.

SUMMARY OF ARGUMENT.

The Court of Appeals, by avowedly reversing for judgment notwithstanding the verdict upon its appraisal of the weight of the conflicting testimony of numerous witnesses upon the question of objective fact whether respondent's headlight was burning, has so far misconceived the functions of an appellate tribunal and has set a precedent so far reaching and gravely compromising the constitutional right of trial by jury under the Seventh Amendment as to make this case worthy of *certiorari* and to require reversal.

ARGUMENT.

I.

The Court of Appeals annulled the plaintiff's verdict and reversed his judgment upon that Court's view of the weight of the conflicting of testimony of numerous witnesses. It thereby denied him the fruits and hence deprived him the right of trial by jury guaranteed by the Seventh Amendment.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, this Court, reversing the Court of Appeals for the Seventh Circuit, said at page 35:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

That the right of a litigant to the fruits of a jury's verdict, where the jury finds the issue of fact upon conflicting evidence, is of constitutional dignity has been held from the earliest period of this Court's history (*Parsons* v. *Bedford,* 3 Peters 433) down to this very day.

In *Parsons* v. *Bedford,* 3 Peters 433, Mr. Justice Storey, speaking for the United States Supreme Court said:

> "This is a prohibition to the Court of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court **where the issue was tried,** or to which the record was properly returnable, or the ward of a *venire facias de novo* by an Appellate Court for some error of law which intervened in the proceedings. The judiciary act of 1789, Ch. 20, Sec. 17, has given to all the Courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law.' And the appellate jurisdiction has also been amply given by the same act (Sec. 22-24) to this Court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.
>
> "Was it the intention of Congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this Court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury?
>
> • • • • • •
>
> "If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a * * * violation, however unintentional, of the constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the Court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at

> the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the Appellate Court, **so far as those facts bear upon any question of law arising at the trial**; and if there be any mistake of the facts, the Court **below is** competent to redress it, by granting a new trial." (Emphasis supplied.

In *Chicago, Burlington, Etc. Rd.* v. *Chicago,* 166 U. S. 226, The United States Supreme Court said at Page 246:

> "The only modes known to the common law 'to re-examine such facts, are the granting of a new trial *by the court where the issue was tried,* or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of *law* which intervened in the proceeding'."

In this case the Court of Appeals took from the plaintiff his verdict and judgment upon its explicit conclusion that "the direct, positive evidence overwhelmingly demonstrates that such was not the fact" i.e., that defendant's headlight was not burning. But it made this statement in spite of its express recognition that the plaintiff, his witness Raney, his witness Cerney, his witness Schmidt and his witness Ceman all testified that they did not see any headlight upon defendant's locomotive.

Thus the Court of Appeals explicitly posits its reversal of this judgment upon its view that it can assay the weight of contradictory testimony, judge veracity and choose among conflicting inferences. The Court of Appeals declares as a matter of **pure fact** that, according to the "overwhelming weight of the evidence" the headlight on respondent's train was not burning.

The Court of Appeals does not gainsay that under the substantive law of Illinois, if respondent's headlight was not in fact burning, as the jury must be presumed to have

found that it was not, a verdict for petitioner would have to be sustained. Therefore it is sufficient to cite *Houser* v. *Wabash R. R. Co.*, 341 Ill. App. 31, in which the trial court directed a verdict for the defendant where there was evidence showing that the plaintiff's car was struck by a train operating without a light. The Appellate Court, reversing, said:

> "While this plaintiff looked in both directions, her vision was cut off and impaired by the darkness of the night."

Other cases recognizing the general rule that recovery will be sustained where a plaintiff collides with an unlighted train are cited in the margin.[1]

The Court of Appeals held, **not** that petitioner could not recover as a matter of Illinois law if the headlight was not in fact burning, **but that in the opinion of the Court of Appeals, the headlight was in fact burning.** The Court of Appeals therefore usurped the functions and preëmpted the province of the jury.

The opinion of the Court of Appeals repeatedly characterized the testimony of witnesses that they did not see

---

[1] In each of the following cases, it was held that where there was evidence tending to show that the plaintiff's car was struck by an unlighted train, the question of the plaintiff's contributory negligence, if any, was for the jury.

ALABAMA: *Sloss* v. *Sheffield Steel & Iron Co.* v. *Willingham*, 10 So. 2d. 19.

CALIFORNIA: *Smith* v. *So. Pac. Co.*, 255 Pac. 500 (Cal. Supreme) (1927);

KANSAS: *Moses* v. *Mo. Pac. R. Co.* (Kan.) 26 P. 2d. 259 (1933);

MISSOURI: *Weller* v. *Chicago, Mil. St. P. & Pac. R. R. Co.*, (Mo.) 54 S. W. 141 (1901);

MICHIGAN: *Fisher* v. *Grand Trunk Western R. Co.*, 306 Mich 95, 10 N. W. 2d. 321 (1943);
Gaffka v. *Grand Trunk Western Ry. Co.*, 306 Mich 246.

OHIO: *Huntsman* v. *Ches. & O. Ry. Co.*, 82 Ohio App. 79, 81 N. E. 2d. 118 (1947);
New York, Chicago & St. L. R. Co. v. *Van Dorp*, 36 Ohio, App. 530, 173 N. E. 445.

W. VIRGINIA: *Morris' Admx.* v. *B. & O. Co.*, 147 S. E. 547;

a headlight or hear a whistle as negative evidence. But under the Illinois law, the proper way of showing that a whistle was not blown or that a headlight was not burning is to have the witness testify that he did not hear the whistle or see the headlight after having shown that he was in a position where he could have heard or seen had there been a whistle or light. *Berg* v. *N. Y. Central R. R. Co.*, 391 Ill. 52, at pages 61 and 62.

The decision of this Court most clearly in point upon the province of a jury in railroad accidents at crossings is *Pokora* v. *Wabash R. R.*, 292 U. S. 98. In that case (which was from Illinois) the plaintiff was driving his truck across the defendant's four track crossing in Springfield, Illinois. While that accident happened in daytime and the obstruction to vision was from defendant's cars standing on the track nearest the plaintiff, this Court, speaking through Mr. Justice Cardozo, likened this obstruction to view to the obscurity of nighttime. A jury in the District Court for the Northern District of Illinois returned a verdict for the plaintiff. The Court of Appeals for the Seventh Circuit held, as it has held in this case, that the plaintiff was guilty of contributory negligence as a matter of law. This Court said at page 101:

> "Pokora made his crossing in the daytime, but like the traveler by night he used the facilities available to one in his position. *Johnson* v. *Seaboard Air Line R. Co.*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. C. A. 627; *Parsons* v. *Syracuse, B & N. Y. R. Co.*, 205 N. Y. 226, 228, 98 N. E. 331. **A jury, but not the court, might say that with facilities thus limited, he should have found some other means of assuring himself of safety before venturing to cross.**" (Emphasis ours.)

Here, then, in this Court's very language is the rule that should have decided the instant case. That rule is that

"the traveler by night" is entitled to use "the facilities available to one in his position" and that "a jury, but not the court, might say that with the facilities thus limited, he should have found some other means of assuring himself of the safety before venturing to cross."

None of the Illinois cases cited in the opinion of the Court of Appeals was a headlight case. *Grubb* v. *Illinois Terminal Co.*, 366 Ill. 330, and *Carrell* v. *N. Y. C. R. R. Co.*, 384 Ill. 599, both of which cases the Court of Appeals cites for the proposition of Illinois law that "the law will not tolerate the absurdity of permitting one to testify that he looked and did not see, when, had he properly exercised his sight, he would have seen," were daylight cases. In each case the traveler with an unobstructed view failed to see a train that was plainly visible.

In any event, while Illinois decisions are of course authoritative on the substantive law of torts in cases where jurisdiction is founded on diversity of citizenship (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64), they are *not* authoritative as to the partition of Federal judicial functions among jury, trial judge and reviewing court, which functions derive from the Seventh Amendment and Federal adjective law. In Illinois, reviewing courts may (with certain exceptions which is not necessary here to explore) reverse when a verdict is against the "manifest weight of the evidence.[2] No comparable function appertains to a United

[2] A recent statement of the Illinois rule that a court of review may weigh the evidence occurs in *Mabee* v. *Sutliff & Case Co.*, 404 Ill. 27, at pp. 31-32:

"The Appellate Court was authorized to examine and consider the evidence insofar as it was necessary to determine whether or not the verdict was against the weight of the evidence. Subparagraph (3) (b) of section 92 of the Civil Practice Act (Ill. Rev. Stat. 1947, chap. 110, par. 216,) provides that the reviewing court may, in any civil case, review errors of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence. (citing Illinois case law)."

States Court of Appeals even when the substantive rights of the parties are governed by State law.

It must be remembered that the unanimous verdict of twelve citizens was approved by an experienced trial judge, who had heard and seen the witnesses and who, unlike a court of review, had the common law power to set aside the verdict and grant a new trial if he deemed it against the manifest weight of the evidence. *Parsons* v. *Bedford,* 3 Peters 433.

II.

This case is of sufficient national moment to elicit certiorari.

We fully recognize that this court does not sit to review records and judgments in ordinary personal injury or other "run-of-the-mine" cases in which no important Federal question is presented even though the judgment to which *certiorari* is sought may be probably wrong.

But in this case the Court of Appeals, by avowedly declaring that it annulled a verdict and reversed a judgment, without even granting a new trial upon its appraisal of the veracity of the witnesses, the credibility of testimony and the tenability of inferences, has set a precedent that profoundly misconceives the function of an appellate tribunal in the Federal judicial hierarchy and seriously diminishes the right of trial by jury assured by the Seventh Amendment.

That the Court of Appeals for the Seventh Circuit misconceives the function of a Federal court of review in cases involving collisions between automobiles and trains at crossings in night-time where there is a question as to whether the train is lighted appears from the only two such cases recently decided by this court: *Reynolds* v. *Balti-*

more & O. R. Co., 185 F. 2d 27, and *O'Keefe* v. *Wabash R. Co.*, 185 F. 2d 241.

In the *Reynolds* case, "When the accident occurred it was dark and the weather was drizzly and misty, and visibility was poor" (185 F. 2d, at p. 29). There was "negative evidence that the railroad company failed to sound the whistle, ring the bell, or turn on its headlight attached to its locomotive as it approached the crossing, although its employees in charge of the train testified that these things were done." Reversing a judgment for the plaintiff and directing the entry of a judgment for the defendant without a new trial, the court said:

> "The misty or foggy condition, which apparently existed before and at the time of the accident, affords plaintiff no excuse."

The court held the defendant guilty of contributory negligence, held that "Under the Indiana law it is negligence as a matter of law to operate and control an automobile at a rate of speed in excess of that within the range of his vision."

Thus the court held that a plaintiff may not recover if, driving in a nocturnal fog, he collides with an unlighted train that is sounding no whistle.

It reached this conclusion notwithstanding the fact that over twenty years ago, this Court unanimously reversed it in *Pokora* v. *Wabash R.R.*, 292 U. S. 98, declaring that "Pokora made his crossing in the daytime, but like the traveler by night he used the facilities available to one in his position."

In *O'Keefe* v. *Wabash R.R. Company*, 185 F. 2d 241, there was evidence to show that the defendant's train was unlighted and that "the flasher signal was not working just prior to the accident." The plaintiff collided with a train that blocked the highway in a fog. The Court of Appeals

held that the plaintiffs, including plaintiffs who were not even driving the car, were guilty of contributory negligence as a matter of law because they drove a car at such speed "that they were unable to stop within the distance covered by the headlights of the automobile." It reached this decision notwithstanding its recognition of the Illinois rule that a signal is "not only to warn traffic of the approach of trains, but its non-operation" is "to assure the traveler" that it "is safe to cross."

The opinion of the Court of Appeals in the instant case, when read in connection with its opinions in the *Reynolds* and *O'Keefe* cases, evinces that court's understanding that questions as to whether, under all of the circumstances, the plaintiff is guilty of contributory negligence in collisions with trains at night, there being a question as to the illumination of the train, are questions for the Court of Appeals.

We can best express our reasons for deeming this case worthy of *certiorari* in the language of Mr. Justice Douglas' concurring opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, at page 70-71:

> "The criterion governing the exercise of our discretion in granting or denying *certiorari* is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

In the *Wilkerson* case the majority opinion at page 63, Mr. Justice Holmes' classic utterance in *Aikens* v. *Wisconsin*, 195 U. S. 194, at page 206:

> "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved."

We submit that unless the Court of Appeals is reversed in this case, its opinion will stand as that court's utter-

ances that it may direct judgment notwithstanding the verdict upon its assessment of the probative value of directly contradictory statements of numerous witnesses. Such a precedent should not survive this court's writ of *certiorari*.

Conclusion.

For reasons apparent in the opinion of the Court of Appeals, asserted in the Petition for Certiorari and urged in this Brief, we respectfully submit that this court should grant *certiorari* to review and reverse the judgment of the Court of Appeals in this case.

Respectfully submitted,

WILLIAM C. WINES,
JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois.

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FILED
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 738

ROBERT SPIKINGS,

Petitioner,

vs.

WABASH RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ELMER W. FREYTAG,
11 South La Salle Street,
Chicago 3, Illinois,
Attorney for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, rendered January 7, 1953, is reported in 201 F. 2d 492.

STATEMENT OF THE CASE.

Either in an attempt to give this case added importance or through carelessness petitioner has mistated the amount of the lower court judgment. It was not $42,500, but $20,000. (Tr. 486.)

Petitioner's statement of facts, purportedly drawn from the opinion of the Court of Appeals herein, is garbled, incomplete and inaccurate.

This case arises out of a claim for damages for personal injuries sustained by the driver of a truck in a collision with a train of the respondent at the intersection of 83rd Place and the tracks of the respondent at the outskirts of the City of Chicago. Respondent's tracks run straight and directly southwest for more than a mile from 83rd Place and are slightly elevated above the surrounding territory. (Tr. 51, 482, 363, 160-161.) The location is in the flat, semi-open country. The tracks cross 83rd Place at grade. There are two main tracks and a side track. (Tr. 53.) This is a wholly unobstructed crossing, the undisputed evidence being that there are no buildings or obstructions of any kind to interfere with the view along the Wabash tracks to the southwest of a person crossing the tracks from west to east. (Tr. 134.) The physical surroundings may be readily visualized from an examination of the prints of the photographs introduced in evidence as respondent's exhibits Nos. 5 through 12 (Tr. 472-479, 362), which petitioner admitted correctly portrayed the physical situation as he approached the tracks the day of the accident. (Tr. 134-138.)

Sunset on February 6, 1948 was at 5:12 P. M. (Tr. 16.) The accident happened 18 minutes later, at 5:30, on a clear cold day. (Tr. 305, 17, 299, 481.) There was 2.2 inches of snow on the ground from a previous snow-fall. (Tr. 17, 42-43, 89.)

Petitioner had lived in the vicinity of the accident for 25 years, and was thoroughly familiar with the crossing. (Tr. 109-111.) He had been over the Wabash tracks at 83rd Place many times before the accident, knew that fast trains passed over that crossing at about that time, and had seen fast passenger trains coming through from the south about 5:00 or 5:30 in the afternoon. (Tr. 111, 134.)

Although petitioner stated that it was dark at the time

of the accident (Tr. 90) and attempted to excuse his failure to see the train on that basis, every other one of the occurrence witnesses testified that he or she could see clearly a block or more at the time of the accident. (Tr. 60-61, 66, 83, 151-153, 242, 345, 329, 271, 186, 212, 305.) As the Court stated in its opinion:

> "* * * Plaintiff by his own witness did establish that visibility was such that even the color of plaintiff's truck was discernible for a distance of more than six hundred feet, and that plaintiff's truck lodged on the front of the engine was discernible from a distance of three hundred to four hundred feet." (Tr. 523.)

and also stated:

> "* * * It is significant, however, that with the exception of the plaintiff, all occurrence witnesses, both those for the plaintiff and the defendant, testified that their visibility was sufficient for them to see the approaching train." (Tr. 521.)

The train traveling north on the farthest track was going 63 miles an hour. (Tr. 10, 298.) As petitioner approached the crossing that afternoon there were no vehicles either approaching or following him. (Tr. 121.) There was no noise from traffic. (Tr. 138.) There was nothing whatsoever to confuse him or to distract his attention.

He says he stopped twice—once 10 feet from the west rail of the side track and the second time 4 or 5 feet from it. (Tr. 124.) He then started up, went across the switch track, and approached the second or southbound track. When the wheels of his truck were just about to the first rail of the southbound track he said he could see south down the northbound main 225 feet. (Tr. 130.)

He was traveling only 5 miles an hour at that time, and stated that he could stop in 3 feet. (Tr. 126.)

When the train was 225 feet away—the distance plaintiff

admitted he could see down the northbound track on which the train was approaching—plaintiff was almost 18 feet from the point of impact. Although he had that distance in which he could stop—and could stop in 3 feet—he never applied his brakes at any time! (Tr. 126.)

The other salient facts adequately appear in the decision of the Court of Appeals. (Tr. 519-526.)

ARGUMENT.

I.

THE COURT OF APPEALS DID NOT MISCONCEIVE ITS FUNCTION AS AN APPELLATE TRIBUNAL AND WEIGH THE EVIDENCE IN THIS CASE. IT CLEARLY RECOGNIZED THAT IT HAD NO RIGHT TO WEIGH CONFLICTING EVIDENCE. AFTER CAREFULLY REVIEWING ALL OF THE EVIDENCE THE COURT CONCLUDED THAT THE PETITIONER HAD FAILED TO ADDUCE SUBSTANTIAL EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF HIS CASE AND THAT HE WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Petitioner seeks to give this ordinary crossing case special importance by alleging that the Court of Appeals weighed the evidence in reaching its conclusion that the petitioner was guilty of negligence as a matter of law, and that the Court's conduct, in effect, deprived him of the trial by jury in violation of the Seventh Amendment.

This is a contention that is frequently made in an effort to persuade this Court to review a case of no importance except to the parties themselves.

In his statement of the matter involved, petitioner says that the Court of Appeals "explicitly recognized and quoted in its opinion the testimony of five witnesses that the headlight on respondent's train was not burning", and states that this was all "direct evidence." The Court of Appeals, however, contrary to petitioner's statement, came to the conclusion that the testimony of these witnesses on this point, as well as with respect to the whistle, was, at best, negative testimony of such character as to have no probative value. It stated (Tr. 523):

> "This is the sum and total of all the proof offered by the plaintiff bearing on the assertion that the engine was running without a headlight or that no whistle was blown for the crossing. It will be noted that there

> is no positive evidence even from the plaintiff himself in support of either assertion. The most that can be said is that the witnesses testified either that they saw no headlight or heard no whistle."

and continued, at page 528:

> "* * * There is not a scintilla of positive evidence that the whistle was not blown and there is nothing more than the barest inference that the train was traveling in the dark without a headlight. * * * The only witness in a position to see the headlight and failed was the plaintiff, the one charged with the duty of looking for it. And there was no witness, other than plaintiff, who was listening and did not hear the whistle, and he did not testify it was not blown but only that he did not hear it."

Because, in attempting to sustain his allegation that the testimony of these witnesses was "direct evidence," petitioner has been inaccurate, we refer to this testimony.

Elizabeth Raney testified that when she saw the locomotive she saw it from the side. She didn't see it from the front. (Tr. 70, 71.) When she looked up and saw the train dragging the truck she didn't see whether or not the headlight was burning on the train. She refused to state whether or not the headlight was burning on the engine when she saw it pushing the cab along. (Tr. 58.)

Dorothy Cerney's testimony was that she was just going into the rear entrance on the east side of the building when she heard the crash. (Tr. 75, 79.) She immediately ran out into the street in front of the building and looked directly north along the east side of the building. By that time the locomotive was directly north of her (traveling northeast toward Chicago). (Tr. 80, 76.) She didn't and couldn't see the headlight. She couldn't see that end of the locomotive. (Tr. 77, 81.)

Dorothy Schmidt was in front of the building on 83rd Place. When she turned around and looked the train was

north of her. She saw it at an angle from the rear, and stated that she didn't see the front end of the engine. (Tr. 81.) That is, of course, correct; because it was going away from her, northbound to Chicago.

As the Court said in its opinion, the only witness to the accident in a position to see the headlight and failed was the plaintiff, the one charged with the duty of looking for it. (Tr. 528.) His testimony, too, was negative. (Tr. 91.) When he heard a noise and looked up he just got one glimpse of the locomotive before it was upon him. (Tr. 138-139.) It is hardly surprising that he did not see or observe the headlight.

The former rule in Illinois with respect to negative testimony[1] no longer prevails, but has been modified so that now the question for determination of the Court is whether the other facts bearing on the evidential value of the negative testimony are such as to give the negative testimony itself probative value. Among the factors to be considered in determining whether the negative testimony is of such substance as to raise an issue of fact proper to be submitted to the jury are the position and proximity of the witness to that about which he is testifying, his attentiveness or lack of attentiveness, whether any of the inferences that could be drawn from the negative testimony is absolutely untenable in view of the positive direct evidence in the record, and numerous other factors dependent upon the particular case.[2]

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1. *Provenzano* v. *I. C. R. R. Co.*, 357 Ill. 192, 196; *Trumbo* v. *C. B. & Q. R. R. Co.*, 389 Ill. 213, 220-221.

2. *Berg* v. *N. Y. C. R. R. Co.*, 391 Ill. 52; *Overstreet* v. *Ill. P. and L. Corp.*, 356 Ill. 378, 385; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-341, 53 S. Ct. 391, 394, 77 L. ed. 819; *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 450; *Foran* v. *Commissioner of Internal Revenue*, 165 F. 2d 705, 707; *Howell Turpentine Co.* v. *Commissioner of Internal Rev.*, 162 F. 2d 319, 325; *National Labor Relations Bd.* v. *Ray Smith Transport Co.* (5th Cir., 1951), 193 F. 2d 142, 146; *Martin* v. *Burgess*, 82 F. 2d 321, 324.

In conformity with this rule, inasmuch as the testimony offered by plaintiff bearing on whether the headlight was lighted was, at best, negative, it was incumbent on the Court of Appeals to examine the other facts that would throw light on the probative value of that negative testimony.

Among the facts thus considered was the positive direct unimpeached testimony of many witnesses, who not only saw that the headlight was burning, but many of whom had a particular reason for observing the headlight.

It is a rule of the Wabash Railroad Company that the headlight must be burning at all times when the train is running, even in broad daylight. (Tr. 328.)

Commencing with the time that the engine crew was changed at Decatur, when both engineer Dely and fireman O'Neil saw that the headlight was lit (Tr. 317, 343), the testimony of the various witnesses covers the entire span of time until after the happening of the accident—through Orland Park, 11 miles from Ashburn, where O'Neil saw the headlight's reflection on the windows of an approaching train which was then on a curve (Tr. 319-320); through Oak Lawn, two miles (approximately two minutes) south of the accident, where postal transportation clerk Lanham saw the reflection of the headlight shine on the mail bag which he picked up there (Tr. 227, 232-233); to the last mile the train traveled before the actual impact, when both Billie Niewold and V. O. Elkins saw the headlight on as the train was approaching the crossing and right up to the time of the accident (Tr. 236, 238, 302, 304); then immediately after the accident, when engineer Dely went out to the front of the engine to see what had happened and at that time observed that the headlight was still lighted—on bright (Tr. 347-348); at the same time that O'Neil, from his position in the cab, also saw the reflection

of the headlight in the steam shooting out from a broken pipe on the left side of the front end of the engine (Tr. 321-322); and waiter Andrew Williams, opening the vestibule door on the left side of the train, saw the reflection of the headlight in that same steam (Tr. 262); continuing with John Thomas Daley, a passenger, and Elwood Long, the coach porter, both of whom saw the headlight burning when they went up to the front end of the engine three or four minutes after the accident (Tr. 187-188, 285); and concluding with more witnesses who saw that the headlight was still burning later on. (Tr. 256, 215, 276.) Seldom has there been such complete and positive testimony that a headlight was lighted!

In arriving at the conclusion that, of the various inferences that could be drawn from the negative testimony, the inference that the headlight was not lighted was untenable, the Court was not, as petitioner suggests, passing upon the credibility of the particular witness, but only on the credibility of the inference itself. Both the testimony that the witness did not see the light and the positive direct testimony that the light was lighted could well be true. There was no inherent conflict or contradiction in this testimony. Of the several possible inferences that could be drawn from this negative statement the only inherent conflict was between the inference that the light was not lighted and the positive direct evidence that it was. The decision that this particular inference had no validity in view of the positive direct unimpeached testimony to the contrary, therefore, did not entail or require the weighing of conflicting or contradictory evidence.

The statement in the opinion of the Court of Appeals (Tr. 523-524):

> "* * * However, if there be any inferences drawn from the testimony of plaintiff's witnesses favorable to the

> theory upon which the case is presented, they are completely obliterated by the positive, direct testimony of defendant's witnesses."

recognizes and gives effect to the well settled rule that a fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven fact or facts but inconsistent with the fact sought to be inferred, is in the record.[3]

In *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 394, 77 L. ed. 819, a leading frequently cited case, this Court stated the applicable rule as follows (pp. 340-341):

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: (citing cases). A rebuttable inference of fact * * * 'must necessarily yield to credible evidence of the actual occurrence.' And, * * * 'It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences.'"

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3. *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 340-341, 53 S. Ct. 391, 394, 77 L. ed. 819; *United States* v. *United States Gypsum Co.,* 67 F. Supp. 397, 450; *Foran* v. *Commissioner of Internal Revenue,* 165 F. 2d 705, 707; *Howell Turpentine Co.* v. *Commissioner of Internal Rev.,* 162 F. 2d 319, 325; *National Labor Relations Bd.* v. *Ray Smith Transport Co.* (5th Cir., 1951), 193 F. 2d 142, 146; *Burdon* v. *Wood,* 142 F. 2d 303, 305; *Martin* v. *Burgess,* 82 F. 2d 321, 324.

In *National Labor Relations Bd.* v. *Ray Smith Transport Co.* (5th Cir., 1951), 193 F. 2d 142, at page 146, the Court stated:

> "* * * Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence. (Citing cases.)"

Recognizing this rule the Court of Appeals for the Seventh Circuit, speaking through Mr. Justice Minton, stated in *Burdon* v. *Wood,* 142 F. 2d 303, at page 305:

> "* * * Where the material evidence from the lips of unimpeached witnesses is non-conflicting and could lead honest, disinterested, and reasonable men to but one conclusion, there are no factual matters to be resolved which call for the intervention of a jury. Such facts await only a court to announce their effect in law. *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 819; *Troutman* v. *Mutual Life Ins. Co.,* 6 Cir., 125 F. 2d 769, 772, 773."

In his Petition and Supporting Brief petitioner singles out one issue in the case—whether or not the headlight was lighted at the time of the collision—and treats it as if it were the sole determining factor in the decision reached by the Court. For obvious reasons, he glosses over an equally important issue in the case—whether the whistle was blown as the train approached the crossing—a warning which under the law it was petitioner's duty to heed. He ignores the fact that since, under the well-established law, it was petitioner's duty to look *and* listen,[4] if, as the

4. *Moudy* v. *N. Y. C. R. R. Co.,* 385 Ill. 446, 452-453; *Greenwald* v. *B. & O. R. R. Co.,* 332 Ill. 627, 633, 631-632; *Carrell* v. *N. Y. C. R. R. Co.,* 384 Ill. 599, 604; *Provenzano* v. *I. C. R. R. Co.,* 357 Ill. 192.

In *Holt* v. *Illinois Cent. R. Co.,* 318 Ill. App. 436, the rule was succinctly stated at page 444:

"* * * 'Ordinary care requires that one in approaching a

Court determined from its careful and thorough study of the record, plaintiff failed in *either* of these duties and such failure was a proximate cause of the accident he was guilty of negligence as a matter of law. Actually, the Court determined that the petitioner had failed in *both* these duties; but even assuming for the sake of argument that it was incorrect in reaching its conclusion as to the headlight—which bore on the petitioner's visual duty—the fact that there was no substantial evidence whatsoever in the record that the warning whistle had not been sounded, and that there was positive uncontradicted testimony in the record that it had been sounded, compelled the Court's decision.[5]

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railroad crossing must not only look and listen, but he must avail himself of every opportunity to do so, to see and hear, and he must see and hear that which the circumstances show was visible and audible to a person in the exercise of ordinary care.' "

5. The Court of Appeals did not, as petitioner suggests, indicate that if the headlight was not lighted under the substantive law of Illinois a verdict for petitioner would have to be sustained. Under the substantive law of Illinois whether the headlight was lighted would be only one of the elements to be considered in determining whether or not the respondent was negligent and whether or not the petitioner was guilty of contributory negligence. Various other elements might be determinative—particularly whether warning signals such as a bell or whistle had been sounded.

Houser v. *Wabash R. Co.*, 341 Ill. App. 31, cited at page 15 of petitioner's brief, is not in point. Plaintiff was struck by a boxcar, and no whistle or bell was sounded prior to the collision.

In virtually all of the cases from other jurisdictions cited by petitioner in the footnote on page 15 there was no warning of any kind either by light, whistle or bell. They are readily distinguishable from the case at bar, in which the record shows conclusively that the whistle was sounded.

Pokora v. *Wabash Ry. Co.*, 292 U. S. 98 has three salient differences from the case at bar. Neither bell nor whistle was sounded; the train was not visible to Pokora while there was still time to stop; and, the burden of proof was on the *defendant* to prove the plaintiff guilty of contributory negligence, unlike the substantive Illinois law governing the case at bar. (p. 100.)

In order to ascertain whether plaintiff actually had received the warning, so as to charge him with negligence for failing to heed it, it was, of course, necessary for the Court to examine the evidence to see whether the whistle had been blown. This did not constitute "weighing the evidence."

There can be no question of the correctness of the Court's conclusion with respect to the insufficiency of the petitioner's evidence that the whistle was not sounded. The entire testimony adduced by petitioner bearing on the sounding of the whistle was that of the witnesses, Dorothy Cerney, Richard Matthews and the petitioner himself.

Dorothy Cerney stated that she couldn't say that she heard the train whistle, she did not know whether the train whistled or not. (Tr. 76, 83.)

Richard Matthews, a passenger on the train, stated that he did not hear any whistle before they crossed 83rd Place, there was no occasion for him to listen for the whistle and he didn't know whether there was one or not. The whistle could have sounded and he not hear it. (Tr. 39, 42-44.)

This is not effective, much less substantial, evidence; and the testimony of neither of these witnesses is of probative value.

The petitioner's testimony was that he did not hear a whistle. (Tr. 91.) He did hear a noise before the impact, a swishing noise like escaping steam. He couldn't tell whether the noise he heard was the sound of a whistle. (Tr. 131.) It may have been the train whistle. He doesn't know. (Tr. 133.)

This was the sum and total of all of the evidence offered by petitioner on this issue.

The only positive direct unimpeached evidence in the record with respect to the whistle was that it had been sounded, commencing at the whistle post and continuing

right down to the time when the brakes went on in emergency. Ten witnesses testified that they heard this whistle. Billie Niewold and V. O. Elkins, standing at the crossings with their attention on the train, heard the whistle. (Tr. 238, 303-304.) As Billie said, it was just like natural—it started before and kept blowing, blowing and blowing, and then the train hit the truck. (Tr. 238, 236.) The engineer and fireman both testified to the whistling. (Tr. 344, 320-321.) Passengers and employees on the train heard the whistle sounding right up to the time the brakes went into emergency. (Tr. 185, 212, 229, 262, 265, 273, 280, 283.)

The record contains no explanation or reason for petitioner's failure to listen attentively at a place where it would be effective. It is undisputed that this was a wide-open, wholly unobstructed crossing at the outskirts of the City of Chicago with which petitioner was thoroughly familiar. (Tr. 134, 472-479, 109-111.) There was no other traffic in either direction and no noise—nothing whatsoever to confuse him or to distract his attention. (Tr. 121, 138.) Nor was there any other train at or near the crossing. Irrespective of anything else—petitioner's failure to so listen was negligence, and bars his recovery. Under the Illinois law, before he was entitled to recover in this case, the petitioner had the obligation to prove by substantial evidence that he was exercising due care and caution at and immediately prior to the accident.[6]

After carefully reviewing all of the evidence on this issue the Court concluded that there was no conflict in it, that the record was devoid of substantial evidence that the whistle was not blown, and that petitioner had failed, therefore, to sustain his burden of proving this essential fact. In reaching this conclusion the Court did not weigh the

6. *Carrell* v. *N. Y. C. R. R. Co.*, 384 Ill. 599, 607; *Soule* v. *Chicago and N. W. Ry. Co.*, 175 F. 2d 424, 426; *Illinois Central Railroad Co.* v. *Oswald*, 338 Ill. 270, 274, 170 N. E. 247; *Allen* v. *Pennsylvania R. Co.*, 120 F. 2d 63, 64.

evidence, as petitioner charges, but examined it to ascertain whether there was any evidence sufficient to sustain petitioner's burden of proof so as to make this issue one for the jury. This was its proper function and duty.

In his statement of the question presented and again in the argument petitioner uses the phrase " 'the overwhelming weight of the evidence' " as if those words had been used by the Court of Appeals in its opinion. They do not appear anywhere therein. The Court of Appeals never referred to the "weight of the evidence". On the contrary, it clearly recognized that it had no right to weigh conflicting evidence, and that if there was substantial evidence in the record that might justify a finding either way on the issue of petitioner's negligence, that issue must be determined by a jury. It specifically stated (Tr. 528):

> "We recognize that the question of plaintiff's contributory negligence, like that of defendant's negligence, is usually a question of fact and that the determination of the jury is conclusive. As this court stated in *Surdyk* v. *Indiana Harbor Belt R. Co. et al.*, 148 F. 2d 795, 797:
>
> > " 'And the question of contributory negligence is ordinarily one of fact for the jury, and only becomes one of law where the undisputed evidence establishes that the injury resulted from the negligence of the injured party. If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury.' "

The Court of Appeals concluded, from its careful and thorough review of the record, that the petitioner had been guilty of negligence as a matter of law, stating (Tr. 528-529):

> "In our view, there could be no diversity of opinion among reasonable men but that plaintiff's negligence was the cause of the collision and his resultant damage. * * * It is not a pleasant duty to reverse the

> modest judgment which he obtained, but after giving the case the most careful study and thought of which we are capable we conclude that the law so requires."

Petitioner's contention, that the reversal of this judgment by the Court of Appeals on the ground that he failed to prove, as required by Illinois law, that he was exercising due care and caution for his own safety at and immediately prior to the accident violated the Seventh Amendment to the Constitution of the United States, is frequently made, primarily for the purpose of having this Court again review the facts, notwithstanding there may be no special or important reason for granting the writ. This contention has been repeatedly held to be without merit. As stated in *Galloway* v. *United States*, 319 U. S. 372, 87 L. ed. 1458, at page 389:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. (Citing cases.)"[7]

II.

THIS ORDINARY CROSSING CASE HAS NO SPECIAL IMPORTANCE SUCH AS WOULD WARRANT REVIEW BY THIS COURT.

The Decisions in Reynolds v. Baltimore & O. R. Co. and O'Keefe v. Wabash R. Co. Do Not Indicate That the Court of Appeals for the Seventh Circuit Misconceives Its Function.

In an effort to bolster the importance of this ordinary run-of-the-mine crossing case petitioner has referred to two other decisions by the Court of Appeals for the Sev-

7. Timely motion for judgment n. o. v. was made. (Tr. 486-487.)

enth Circuit and charged that those decisions and the instant case show that said Court misconceives its function as a court of review. As we have pointed out heretofore, the Court did no such thing in the instant case. Nor did it do so in the other two cases.

In *Reynolds* v. *Baltimore & O. R. Co.*, 185 F. 2d 27, Cert. denied, 340 U. S. 947, 95 L. ed. 683, 71 S. Ct. 531, plaintiff's car struck the side of defendant's locomotive which was barely moving. The accident occurred in Indiana on a dark misty night when visibility was poor. There were three signs at various distances from the tracks warning of the existence of said railroad crossing. Plaintiff testified that his headlights were turned on and enabled him to see the highway for about 75 feet ahead, and he was traveling about 35 to 40 miles an hour. He was familiar with the crossing in question, having gone over it twice daily for at least one and possibly five months prior to the accident.

There was testimony that the railroad company had failed to sound the whistle, ring the bell, or turn on its headlight as the locomotive approached the crossing; and for the purpose of the appeal the Court assumed that the railroad was negligent in these respects.

Under Indiana law (as under Illinois law) it was incumbent on the plaintiff not only to prove that the defendant was negligent, but also that he himself was exercising due care and caution at and immediately prior to the accident.

The Court noted that under Indiana law it is negligence as a matter of law for a motorist to operate his vehicle on a highway under such conditions that he cannot see and heed warning signs erected for the protection of persons using the highways; and that by statute and under Indiana law it is negligence, as a matter of law, to operate a motor

vehicle on a highway at a rate of speed in excess of that within which the operator can bring it to a stop within the range of his vision.

Accordingly, the Court concluded that, under the facts and circumstances disclosed in the record, plaintiff's failure to see and heed the warnings that a railroad crossing existed a short distance ahead on his line of travel, together with his failure to so operate and control his automobile that he could bring it to a stop within the range of his vision, constituted negligence as a matter of law and barred his recovery.

Petitioner's comment on *O'Keefe* v. *Wabash R. Co.*, 185 F. 2d 241, Cert. denied, 341 U. S. 921, 95 L. ed. 1354, 71 S. Ct. 743, is inaccurate and incorrect. The Court did not hold that the plaintiffs were guilty of contributory negligence as a matter of law. Because there might be doubt as to the plaintiffs' contributory negligence and the Court recognized that it had no right to weigh conflicting evidence, the Court specifically refrained from reversing the judgment on that ground. It stated at page 244:

> "* * * It would seem that under these circumstances the evidence established contributory negligence, but since we are in doubt as to whether there was a jury question in this respect, we prefer to discuss defendant's second contention, *i. e.*, that no actionable negligence was shown. We must determine whether there was any evidence upon which a charge of negligence on defendant's part can be found in the record."

The Court then determined, as a matter of law, that there was no evidence of any negligence on the part of the defendant; and, therefore, reversed the judgment solely on that ground, saying in the concluding paragraph of its decision (p. 245):

> "Since the evidence fails to show any negligence of

defendant which proximately contributed to the accident, the judgment must be reversed. It is so ordered."

At the time of the accident, 5 A. M., the railroad was engaged in switching cars off the rear end of a freight train. The cars to be cut had been dropped, and the engine had coupled onto the caboose and pulled it back preparatory to reattaching it to the rear of the train. While the engine and caboose were standing on the crossing, having just completed the backup movement, and before the switch had been thrown to permit their forward movement, the car driven and occupied by plaintiffs crashed into the rear of the caboose.

As the Court stated at page 244, its decision was governed by the settled Illinois law "that where a railroad train rightfully and for a reasonable period of time occupies a crossing of its tracks with a public highway, the very presence of the train is adequate notice and warning to any traveler, who is in the exercise of ordinary care for his own safety, that the crossing is occupied; that no additional signs, signals or warnings are required to be given by the railroad company, and that no negligence can be imputed to it for its failure so to do."[8]

Whether or not the headlight was lighted and warning signals were given had no bearing on the final result in either of these decisions. As will be seen from the foregoing analysis, each of said cases was decided on a point of law which made these questions unimportant.

Nothing in these decisions indicates that the Court of Appeals for the Seventh Circuit does not understand and

8. *Coleman* v. *Chicago, B. & Q. R. Co.*, 287 Ill. App. 483, 489, 5 N. E. 2d 103, 105; *Cash* v. *New York Central R. Co.*, 294 Ill. App. 389, 13 N. E. 2d 1012; *Fox* v. *Illinois Central Railroad Co.*, 308 Ill. App. 367, 31 N. E. 2d 805; *Probert* v. *Chicago, I. & L. Ry. Co.*, 93 F. 2d 259.

properly respect its function as an appellate court. This Court denied petitions for certiorari in both of these cases. *Reynolds* v. *Baltimore & O. R. Co.*, 340 U. S. 947, 95 L. ed. 683, 71 S. Ct. 531; *O'Keefe* v. *Wabash R. Co.*, 341 U. S. 921, 95 L. ed. 1354, 71 S. Ct. 743.

The Only Question Present in this Case—Whether There Was Substantial Evidence—Is One Which this Court Rarely Reviews.

Inasmuch as the Court of Appeals did not weigh the evidence in the case at bar in reaching its ultimate conclusion that the petitioner was guilty of negligence as a matter of law, but recognized that it had no right to weigh conflicting evidence, and that if there was substantial evidence in the record that might justify a finding either way on the issue of petitioner's negligence that issue must be determined by a jury—the only question present in this case is whether the Court was correct in its determination that the petitioner had failed to prove the essential elements of his case by substantial evidence.

While we recognize that Courts or judges might differ as to what does or does not constitute substantial evidence, this Court has, with rare exceptions, consistently followed the policy of granting its writ of certiorari only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Co.* v. *Western Well Works*, 261 U. S. 387, 393. Clearly this ordinary run-of-the-mine crossing case does not fall within the aforesaid categories.[9]

9. In *Magnum Co.* v. *Coty*, 262 U. S. 159, in pointing out the frequency with which the Court is burdened by unwarranted petitions for certiorari, this Court stated at page 163:

"* * * The jurisdiction to bring up cases by certiorari from

As was stated by Mr. Justice Frankfurter in *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, at page 503, after quoting the aforesaid language from Mr. Chief Justice Taft's opinion and pointing out that the Revised Rules of the Supreme Court of the United States, Rule 38(5), are in accord:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated."

The Supreme Court of the United States was never intended to be burdened with such questions as the examination of the evidence in ordinary crossing cases to ascertain whether the petitioner had proved all of the essential elements of his case.

Mr. Justice Holmes, in *United States* v. *Johnston*, 268 U. S. 220, 227, stated the rule with his usual simple clarity: "We do not grant a certiorari to review evidence and discuss specific facts."

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the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Courts of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

CONCLUSION.

It is respectfully submitted that the reasons urged by petitioner for granting a writ of certiorari are not valid. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, nor is this case of national or special importance. The writ should, therefore, be denied.

Respectfully submitted,

ELMER W. FREYTAG,
11 South La Salle Street,
Chicago 3, Illinois,
Attorney for Wabash Railroad Company, Respondent.